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Commercial Torts and Deceptive Trade Practices

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COMMERCIAL TORTS AND DECEPTIVE TRADE PRACTICES

by

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I. COMPETITIVE PRACTICES

A. Antitrust

CASES under the Texas Free Enterprise and Antitrust Act of 1983[1] have not yet reached the appellate courts, and the scope of this Article does not include the review of federal law developments. One Fifth Circuit decision during the survey period, however, did consider what the court denominated a state antitrust claim arising under article 21.21, section 4(4), of the Texas Insurance Code.[2] In *Hood v. Tenneco Texas Life Insurance Co.*[3] the plaintiff alleged that his termination as an insurance agent was the result of a boycott between his former employer and another company, both wholly owned subsidiaries of Tenneco.[4] Plaintiff alleged violations of section 1 of the Sherman Act[5] as well as of the Texas Insurance Code.

In considering the state law claim,[6] the court stated that Texas courts "probably" would apply the Insurance Code prohibition against boycotts by parties who are independent and able to act in competition with one another.[7] Because the court was uncertain whether Texas courts would apply the holding in *Copperweld Corp. v. Independence Tube Corp.*,[8] the court ana-

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1. TEX. BUS. & COMM. CODE ANN. §§ 15.01-.40 (Vernon Supp. 1985).
2. TEX. INS. CODE ANN. art. 21.21, § 4(4) (Vernon 1981). The statute section prohibits agreements, boycotts, intimidation, or coercion that result in or tend to result in unreasonable restraint of, or monopoly in, the business of insurance.
3. 739 F.2d 1012 (5th Cir. 1984).
4. Specifically, the plaintiff alleged that the Tenneco companies sought to stop the plaintiff from brokering for other companies.
5. 15 U.S.C. § 1 (1982) (prohibiting contracts, combinations, or conspiracies in restraint of trade).
6. The federal antitrust claim was easily disposed of under Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2742-43, 81 L. Ed. 2d 628, 633-35 (1984), which held that a parent corporation cannot conspire with its wholly owned subsidiary.
7. 739 F.2d at 1016 (quoting Padgitt v. Lone Star Gas Co., 213 S.W.2d 133, 136 (Tex. Civ. App.—Dallas 1948, no writ) (decided under TEX. REV. CIV. STAT. ANN. arts. 7426-28 (1960) (repealed 1967), the former Texas antitrust law)).
8. 104 S. Ct. 2731, 81 L. Ed. 628 (1984); *see supra* note 6.

lyzed the plaintiff's state law claims under the precedents that would be applied under section 1 of the Sherman Act.[9] The court affirmed the dismissal of the plaintiff's claims, holding that the claims did not set forth a per se violation and that under the facts the plaintiff had not shown an unreasonable restraint on competition.[10]

B. Trade Secrets

Two cases decided during the survey period illustrate the application of well established principles of Texas law governing disclosure of trade secrets.[11] In *Dailey International Sales Corp. v. Eastman Whipstock, Inc.*[12] the Houston court of appeals held that a party who acquires knowledge of an invention during the course of a confidential relationship, but subsequent to the issuance of patents covering the invention, is not liable for the disclosure of the invention to third parties.[13] The Fifth Circuit in *Interox America v. PPG Industries, Inc.*[14] held, in affirming the denial of a preliminary injunction, that information relating to the configuration of a gas plant did not constitute a trade secret.[15] Although the complex facts necessitated a narrow holding of the case, the court stated that when one voluntarily discloses information or fails to take reasonable precautions to ensure its secrecy, he cannot properly claim that the information constitutes a trade secret.[16] The application of this holding to cases such as *Dailey International Sales* would appear to be proper.

C. Trade Names

In a case of apparent first impression, the Dallas court of appeals held in

9. The court cited Transource Int'l v. Trinity Indus., Inc., 725 F.2d 274 (5th Cir. 1984); Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384 (5th Cir. 1983); Blackburn v. Crum & Forster, 611 F.2d 102 (5th Cir.), *cert. denied*, 447 U.S. 906 (1980).

10. 739 F.2d 1018-19.

11. The Fifth Circuit also decided a third trade secret case during the survey period. In Union Carbide Corp. v. UGI Corp., 731 F.2d 1186 (5th Cir. 1984), the Fifth Circuit held that under Pennsylvania law technical and marketing information and strategies are protectable trade secrets. *Id.* at 1191-92.

12. 662 S.W.2d 60 (Tex. App.—Houston [1st Dist.] 1983, no writ).

13. *Id.* at 62. The court contrasted the situation in which a fiduciary acquires his knowledge before the issuance of a patent on the product. *Id.* The distinction is not one of substance and exists only to distinguish Hyde Corp. v. Huffines, 158 Tex. 566, 314 S.W.2d 763, *cert. denied*, 358 U.S. 898 (1958), and K & G Oil & Tool Serv. Co. v. K & G Fishing Tool Serv., 158 Tex. 594, 314 S.W.2d 782, *cert. denied*, 358 U.S. 898 (1958). *Hyde* and *K & G* held that a party who acquired confidential or trade secret information in the course of a confidential relationship may be liable for its disclosure or use even after the information is public knowledge. *Hyde*, 158 Tex. at 575-76, 314 S.W.2d at 773-75; *K & G*, 158 Tex. at 606-07, 314 S.W.2d at 790-91. *Hyde* and *K & G* should be overruled to the extent that they stand for such a principle, and Texas courts should adopt the common sense principles that once a party entitled to protection makes public confidential information, all persons may use the information freely irrespective of whether they gained knowledge of the information before or after it was made public. *See* Hughes, *Torts—Commercial, Annual Survey of Texas Law*, 37 Sw. L.J. 1, 12 (1983), for discussion of other cases applying *Hyde* and its progeny.

14. 736 F.2d 194 (5th Cir. 1984).

15. *Id.* at 201.

16. *Id.* at 202.

First Gibralter Mortgage Corp. v. Gibralter Savings Association[17] that a declaratory judgment action is an available vehicle to determine infringement or noninfringement of a protected trade name.[18] The court's holding is somewhat surprising in light of its recent holding in *K.M.S. Research Laboratories v. Willingham.*[19] In *K.M.S.* the court of appeals held that the liability of a potential defendant in a products liability case cannot be tested under the Declaratory Judgment Act.[20] The court in *First Gibraltar,* however, looked to federal precedent as it had previously in *K.M.S.*[21] to decide the issue. On the basis of a federal district court decision in Alabama,[22] the Dallas court upheld the right of action.[23]

As trade name cases often turn upon the peculiar facts presented in each instance, each particular case may be of narrow applicability. Two cases decided during the survey period are nevertheless worthy of attention. *Bank of Texas v. Commerce Southwest, Inc.*[24] illustrates the difficulty of proving a protectable interest in a name which is descriptive in nature. Unless the plaintiff can show that a descriptive name, in this instance a geographic location, has acquired the necessary secondary meaning,[25] it will not be protected.[26] Despite a wide variety of forms of proof offered,[27] the plaintiff could not show that the name "Bank of Texas" acquired a secondary meaning entitling it to protection.[28]

Hudgens v. Goen[29] serves as an example of the lack of precision often present in Texas trade name cases. In *Hudgens* the defendant, Goen, owned a funeral home that bore his name for a number of years. With Goen's consent, Hudgens acquired the business from the first purchaser, and Goen allowed Hudgens to use the Goen name for approximately two years, after which he decided that he did not want his name to be associated with the business. The court first held that in an unfair competition case, the plaintiff need only show that (1) the name has a secondary meaning and (2) the use of

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17. 658 S.W.2d 709 (Tex. App.—Dallas 1983, writ dism'd).

18. *Id.* at 711.

19. 629 S.W.2d 173 (Tex. App.—Dallas 1982, no writ).

20. *Id.* at 174; TEX. REV. CIV. STAT. ANN. art. 2524-1 (Vernon 1965 & Supp. 1985).

21. 629 S.W.2d at 174. The court relied upon Cunningham Bros., Inc. v. Bail, 407 F.2d 1165 (7th Cir.), *cert. denied,* 295 U.S. 959 (1969).

22. Pizitz, Inc. v. Pizitz Mercantile Co., 467 F. Supp. 1089, 1097-98 (N.D. Ala. 1979).

23. *First Gibraltar,* 658 S.W.2d at 711.

24. 741 F.2d 785 (5th Cir. 1984).

25. A term or name acquires a secondary meaning when, over a period of time, it has come to be identified, in the mind of the public, with a particular product or producer. Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 118 (1938); Continental Motors Corp. v. Continental Aviation Corp., 375 F.2d 857, 861 (5th Cir. 1967).

26. 741 F.2d at 787; I. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 15.1(a) (1973); *see, e.g.,* Miller v. Lone Star Tavern, Inc., 593 S.W.2d 341, 344 (Tex. Civ. App.—Waco 1979, no writ); Harrelson v. Wright, 339 S.W.2d 712, 714 (Tex. Civ. App.—Eastland 1960, writ ref'd).

27. The plaintiff presented evidence of nine years of use in Dallas County, extensive advertising, actual instances of consumer confusion, a consumer opinion poll, and expert testimony.

28. 741 F.2d at 787.

29. 673 S.W.2d 420 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

the similar name by the defendant would confuse the public.[30] The court rejected the holding in *Miller v. Lone Star Tavern, Inc.*[31] that the plaintiff must also show a probability of irreparable harm.[32] The court also held, however, that when no competition was present not only must the plaintiff show irreparable harm, but he must also show that the use of the name was fraudulent.[33] Because the jury had found no likelihood of irreparable harm and the plaintiff had not requested a special issue on whether the use of the name amounted to fraud, the court reversed the award of injunctive relief.[34]

D. *Trade Dress*

Closely akin to the trade name cases are those in which the defendant has appropriated the image or trade dress of a business or product, as, for example, the size, shape, color, texture, graphics, and sales techniques. Two cases involving restaurant operation decided during the survey period are noteworthy in the trade dress area. In *Freddie Fuddruckers, Inc. v. Ridgeline, Inc.*[35] the plaintiff sought and received a preliminary injunction against the operation of a restaurant almost identical in design and approach to the plaintiff's.[36] Relying on federal precedent,[37] the court held that the essential element in a trade dress case is proof that the alleged infringement creates a likelihood of consumer confusion as to the source of the goods.[38] The court required proof of a secondary meaning[39] to the plaintiff's trade dress.[40] The court specifically found that the plaintiff had proven the existence of a secondary meaning to its trade dress and that the plaintiff had shown that irreparable harm could occur from the defendant's infringement.[41]

In *Line Enterprises, Inc. v. Hooks & Matteson Enterprise, Inc.*[42] the plaintiff, operators of County Line and State Line barbecue restaurants, sought to enjoin the defendant from operating a restaurant of similar design and format. The trial court had instructed the jury to determine whether the defendant intended to deceive the public. The Amarillo court of appeals held

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30. *Id.* at 423-24.
31. 593 S.W.2d 341 (Tex. Civ. App.—Waco 1979, no writ).
32. *Id.* at 344. *Miller* and the cases cited therein are frequently cited decisions, and the court in *Hudgens* was perhaps cavalier in casting them aside. *See infra* notes 45-47 and accompanying text. The discussion of unfair competition cases in *Hudgens* was, however, a dictum.
33. 673 S.W.2d at 424.
34. *Id.* The supreme court will, one hopes, clarify the elements required in trade name cases, both where competition is present and where it is not. If the plaintiff must show fraudulent conduct as held in *Hudgens v. Goen*, clarification of the conduct that will satisfy the requirement is necessary.
35. 589 F. Supp. 72 (N.D. Tex. 1984).
36. The trade dress of both restaurants included at least ten virtually identical features ranging from the exposed glassed-in butcher shop concept to the same color neon lights and beer signs. *Id.* at 74-75.
37. The court cited Original Appalachian Artworks, Inc. v. Toy Loft, 684 F.2d 821, 831 (11th Cir. 1982) (likelihood of confusion is essential element in trade dress case).
38. 589 F. Supp. at 76.
39. *See supra* note 25.
40. 589 F. Supp. at 77.
41. *Id.* at 78.
42. 659 S.W.2d 113 (Tex. App.—Amarillo 1983, no writ).

that a finding of intent was not necessary.[43] The court stated that a showing that deception will naturally and probably result from the operation or that the public is likely to be deceived or confused is sufficient.[44] The plaintiff's claim that it was entitled to a preliminary injunction against the defendant on its cause of action for unfair competition is of particular interest in view of the trade name cases discussed above. The appellate court, citing *Miller v. Lone Star Taverns, Inc.*,[45] held that to be entitled to injunctive relief the plaintiff must show that he will suffer irreparable harm.[46] The court in *Line Enterprises* is thus at direct odds with the Fort Worth court in *Hudgens v. Goen*[47] on the question of the requirement of such a showing in an unfair competition case.[48]

Although the element of functionality[49] does not arise in trade name cases, it is important in situations involving trade dress. In an opinion far too exhaustive to report here in detail, the Fifth Circuit thoroughly reviewed the concept of functionality in *Sicilia Di R. Brebow & Co. v. Cox*.[50] At issue was the defendant's design of a plastic citrus juice container similar to that used by the plaintiff. The Fifth Circuit held that when a design merely assists in a product's or configuration's utility, it is not functional and may be protected.[51] In order to be legally functional, and thus unprotectable, the design must be one of a limited number of equally efficient options such that trademark protection would unduly hinder free competition.[52] The court's opinion, which the court considered to be its first confrontation with the meaning and application of functionality, merits close attention by any attorney faced with a trade dress case.

II. Tortious Interference with Contract

A review of the development of the tort of interference with contractual relations in this state reveals two fairly distinct lines of cases. Earlier cases tended to describe the tort very generally without clearly articulating the elements of the offense.[53] Later cases more precisely defined the tort and set out four elements that must be shown: (1) that a contract existed; (2) that the act of interference was willfull and intentional; (3) that the act of interference was the proximate cause of the plaintiff's damages; and (4) that ac-

43. *Id.* at 117.
44. *Id.*
45. 593 S.W.2d 341 (Tex. Civ. App.—Waco 1979, no writ).
46. *Id.* at 344.
47. 673 S.W.2d 420, 423-24 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).
48. For a discussion of *Hudgens*, see *supra* note 29 and accompanying text.
49. Functionality requires that if utilitarian or functional considerations dictate a product's design, the design will not be given protection. Sicilia Di R. Brebow & Co. v. Cox, 732 F.2d 417, 424-25 (5th Cir. 1984).
50. 732 F.2d 417 (5th Cir. 1984).
51. *Id.* at 429.
52. *Id.* Although directly at issue was the question of trademark protection, the trade dress concept is directly analogous.
53. *See, e.g.*, Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80, 91 (Tex. 1976); Terry v. Zachry, 272 S.W.2d 157, 159 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.).

tual damages or loss occurred.[54] As a defense, the defendant may show that the interference was privileged or justified.[55]

The decision of the Houston court of appeals in *Bellefonte Underwriters Insurance Co. v. Brown*[56] followed the precision of the later cases and represents a good analysis of the tort of interference with contractual relations. The case highlights the substantial risk that arises from what has been described as a routine practice in the insurance industry. In *Bellefonte* Brown had contracted with Bellefonte and six other insurance carriers for fire coverage on his business facility. A fire occurred, and Bellefonte denied coverage based upon the mistaken belief that Brown had misrepresented the specifications of the sprinkler system in Brown's facility. Bellefonte's Texas agent sent a a telex to at least two of the co-insurers urging them to concur with Bellefonte's decision and to deny coverage, thus strengthening Bellefonte's bargaining position with Brown. As a result of the telex, at least one other insurer delayed payment under its policy. Eventually all insurers except Bellefonte paid their portion of Brown's claim. In his claims against Bellefonte, Brown alleged that the telex constituted a tortious interference with his contractual relations with the co-insurers. The jury found each of the four elements of a tortious interference and found that Bellefonte's acts were either maliciously committed or done with reckless disregard of Brown's rights. The trial court awarded punitive damages of $1,000,000.

Bellefonte argued that the sending of the telex was privileged because it was an exercise of its own rights and that it possessed an equal interest to that of the plaintiff in the subject matter. Bellefonte additionally pointed out that each witness with insurance expertise testified that such communications were routine in such instances. The appellate court rejected Bellefonte's claim of privilege, holding that a privilege is lost if the communication is made with malice or lack of good faith.[57]

The claim of privilege or justification was also at issue in the subsequent decision of the Texas Supreme Court in *Sakowitz, Inc. v. Steck*,[58] but the reasoning and outcome differed dramatically from *Bellefonte*. Steck placed her name on the first page of an employment contract that contained a noncompetition clause but did not sign on the signature page. Steck subsequently left Sakowitz and went to work for Oshman's Sporting Goods in violation of the restrictive covenant. Sakowitz's attorney wrote a letter to Oshman's stating that Steck's new employment violated the noncompetition agreement. Steck was terminated and brought an action for libel and tor-

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54. *See, e.g.*, Phillips v. Vandygriff, 711 F.2d 1217, 1230 (5th Cir. 1983), *petition for cert. filed*, 42 U.S.L.W. 3846 (U.S. May 7, 1984) (No. 83-1813); Leonard Duckworth, Inc. v. Michael L. Field & Co., 516 F.2d 952, 956 (5th Cir. 1975); Armendariz v. Mora, 553 S.W.2d 400, 404 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

55. An interference is privileged or justified if the act is an exercise of the defendant's own rights and the defendant's interest in the subject matter is at least equal to that of the plaintiff. Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80, 91 (Tex. 1976).

56. 663 S.W.2d 562 (Tex. App.—Houston 1983, writ ref'd n.r.e.).

57. *Id.* at 573. In a word of warning, the court stated that while insurance companies have the right to exchange information, they may not solicit a conspiracy to deny a claim. *Id.*

58. 669 S.W.2d 105 (Tex. 1984).

tious interference with her employment contract with Oshman's. Sakowitz claimed that its conduct was privileged. The trial court granted summary judgment to Sakowitz. The court of appeals reversed, holding that, with respect to the tortious interference claim, the summary judgment evidence did not establish the defense of privilege as a matter of law.[59]

The supreme court reversed the court of appeals in *Sakowitz* and reinstated the summary judgment.[60] The court, in an opinion by former Chief Justice Pope, held that to establish her claim Steck had to show that (1) the defendant maliciously interfered with the contractual relationship and (2) the defendant did so without legal justification or excuse.[61] The court went on to hold that Sakowitz was privileged to assert its claim to the noncompetition agreement if it asserted a colorable legal right.[62] Because the court found that Steck presented no summary judgment evidence regarding lack of justification, the court affirmed the summary judgment against her.[63]

As the three-judge dissent pointed out, the elements of the tort of interference with contractual relations have become reasonably well-established[64] and are not those the majority addressed.[65] Moreover, justification and privilege are affirmative defenses that the defendant must establish.[66] As the dissent noted, the party asserting a privilege does not deny an interference, but seeks to avoid liability based upon a claim interest that is being impaired by the plaintiff. Such a defense should be a matter of "confession and avoidance" upon which the defendant bears the burden of proof under the Texas Rules of Civil Procedure.[67] The decision of the court in *Sakowitz, Inc. v. Steck* appears to be a confused and incorrect analysis and represents a step

59. 659 S.W.2d 91 (Tex. App.—Houston [14th Dist.] 1983, *rev'd*, 669 S.W.2d 105 (Tex. 1984). The court of appeals held that the letter from Sakowitz's attorney, as a first step toward litigation, enjoyed the same privilege from libel as do pleadings filed in the litigation itself. The court, however, rejected Sakowitz's argument that a communication privileged from libel attack automatically is privileged with respect to other causes of action. 659 S.W.2d at 93. The libel claim was not at issue in the supreme court.

60. 669 S.W.2d at 107.

61. *Id.*

62. *Id.*

63. *Id.* at 108.

64. *See supra* note 54.

65. The majority cited Terry v. Zachry, 272 S.W.2d 157 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.) as authority for its two-element definition of the claim. *Terry* did not so hold. Although the court did state that an important element of the assertion of such is that the interference must be without right or justification, the court's opinion, taken as a whole, comes much closer to supporting the established four-element definition of the tort. *Id.* at 159; Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80, 91 (Tex. 1976).

66. *See, e.g.*, Bellefonte Underwriters Ins. Co. v. Brown, 663 S.W.2d 562, 573 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); Armendariz v. Mora, 553 S.W.2d 400, 404 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.); Tippett v. Hart, 497 S.W.2d 606, 613 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam*, 501 S.W.2d 874 (Tex. 1973); RESTATEMENT (SECOND) OF TORTS § 767 (1979).

67. *See* TEX. R. CIV. P. 94. If the question of the proper placement of the burden of proof on the issue of privilege or justification were ever in doubt, the doubt stems from the same loose language of cases such as Terry v. Zachry, 272 S.W.2d 157 (Tex. Cir. App.—San Antonio 1954, writ ref'd n.r.e.), and Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80 (Tex. 1976), upon which the majority relied in formulating its two-element definition of the tort. No Texas case has squarely held that the plaintiff must disprove justification.

backward in the development of the tort of interference with contractual relations.[68] Until the Texas Supreme Court resolves the apparent conflict between *Sakowitz* and *Bellefonte*, the cautious plaintiff's counsel will plead and prove the absence of privilege or justification on the part of the defendant.

III. EMPLOYER-EMPLOYEE RELATIONS

A. *Unfair Competition*

During the survey period employers did not fare well in their attempts to prohibit former employees from engaging in competition in violation of covenants not to compete. Under Texas law, restrictive covenants are enforceable if they are reasonable, and the test used in determining reasonableness is whether the covenant imposes upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer.[69] In determining whether a restraint is reasonably necessary to protect the business and good will of the employer, courts have focused upon the scope of the restraint in terms of geographic area and length of time that the covenant is to run.[70] Courts will either refuse to enforce overbroad covenants or enforce them only for a time and within an area that is reasonable under the circumstances.[71]

In *Diesel Injection Sales & Services v. Renfro*[72] the court took an exceedingly narrow view of what constitutes a restraint reasonably necessary to protect the business and good will of the employer. Diesel, which operated a diesel engine sales and repair shop in Nueces County, required its mechanics to sign employment agreements that contained covenants not to engage in the diesel fuel injection business within the county for a period of two years following the termination of their employment. The defendants terminated their employment with the plaintiff and, although they had signed such agreements, immediately went to work for a competitor within the same county.

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68. The court's refusal of the writ of error in *Bellefonte* only serves to make matters worse. Hopefully, the court will undo the damage done at the earliest opportunity.

69. Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 312-13, 340 S.W.2d 950, 951-52 (1960).

70. *See id.* at 312-13, 340 S.W.2d at 951; Hi-Line Elec. Co. v. Cryer, 659 S.W.2d 118 (Tex. App.—Houston [14th Dist.] 1983, no writ). The court in *Hi-Line* held that an agreement not to compete within the existing marketing area of the employer or areas contemplated or begun as expansion during the employee's employment, whether known to the employee or unknown, was equivalent to an agreement not to compete anywhere in the world for the designated period and was therefore unenforceable. *Id.* at 121. The court also held that the plaintiff failed to show a probable injury that would support the issuance of a temporary injunction because the customers that the former employee solicited testified that they had not purchased and did not contemplate purchasing goods from him. *Id.*

71. Martin v. Linen Syss. for Hosps., Inc., 671 S.W.2d 706, 709 (Tex. App.—Houston [1st Dist.] 1984, no writ), in which the court reduced the length of time during which the employee was prohibited from competing from eighteen months to one year and reduced the restricted territory from a 10-mile radius of any customer of the employer to a 10-mile radius of the employer's principal business office. *Id.*

72. 656 S.W.2d 568 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

In affirming the trial court's denial of a permanent injunction and damages, the appellate court held that restrictive covenants are only necessary to protect the business and good will of the employer in instances in which the employee either has had direct contact with customers or has been in possession of trade secrets or other confidential information of the employer.[73] Although the defendants had been trained at Diesel's expense in a very competitive business, the court held that the employer could not enforce the covenants in the absence of customer contact or access to confidential information.[74]

The dissent in *Diesel* was highly critical of the majority's narrow definition of a restraint reasonably necessary for the protection of the business and good will of an employer.[75] The dissent noted that although cases in which employees have had access to trade secrets or direct contact with customers constitute the majority of cases in which covenants not to compete have been enforced, those cases are not exclusive.[76] Emphasizing both the considerable expense undertaken to educate and train the defendants as mechanics in a highly specialized field and the high demand for trained diesel engine mechanics in Nueces County, the dissent argued that the covenant not to compete was necessary in order to protect the business and good will of Diesel.[77]

The employer in *Mejerle v. Brookhollow Office Products, Inc.*[78] sought to enjoin its former employees from engaging in acts of allegedly unfair competition in the absence of a covenant not to compete. The plaintiff employer sought to uphold the trial court's issuance of a temporary injunction on the ground that the employees had breached their implied duty of loyalty. The plaintiff alleged that during their employment, the defendants had profited by supplying the plaintiff's customers with products furnished by competitors. After their termination, the defendants had continued to call upon these same customers. The trial court granted a temporary injunction prohibiting the defendants from calling upon those customers that were cultivated during the defendants' employment with the plaintiff. The court of appeals reversed, holding that although these particular acts could give rise to a cause of action for damages, they did not demonstrate any need for the entry of injunctive relief.[79]

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73. *Id.* at 570-71.
74. *Id.* at 572.
75. *Id.* at 574-75 (Nye, C.J., dissenting).
76. *See* Sakowitz, Inc. v. Steck, 669 S.W.2d 105, 106-07 (Tex. 1984), discussed *supra* notes 58-68. The sole justification asserted for the covenant not to compete was the employer's understandable reluctance to undergo the expense of training personnel who could then immediately go to work for competitors. The supreme court did not question the validity of this justification.
77. 656 S.W.2d at 574-75. The dissent would appear to have the better side of the argument. Under some circumstances the protection of an employer's business and good will requires preventing employees that have been trained at its expense from using that training in direct competition. The majority's contrary conclusion can only be attributed to a desire to restrict the circumstances under which employees can be subjected to restrictive covenants.
78. 666 S.W.2d 192 (Tex. App.—Dallas 1983, no writ).
79. *Id.* at 193-94. The court expressly disapproved of the earlier decision of Gaal v.

Executive Tele-Communication Systems, Inc. v. Buchbaum[80] turned on a point of procedure of which practitioners should be aware. The plaintiff's petition alleged that the defendant violated a written covenant not to compete, and the defendant filed only a general denial in response. At the temporary injunction hearing, the defendant testified that he did not execute the employment contract. Although the Texas Rules of Civil Procedure[81] require a party to file a sworn denial of execution of a written instrument,[82] the court held that the provisions of the rule do not apply to temporary injunction hearings.[83] Therefore, those who seek to enforce covenants by way of a temporary injunction should be prepared to prove the existence of the agreement regardless of the state of the pleadings.

Greenstein v. Simpson[84] contained the only good news for employers seeking to enforce covenants not to compete. The court addressed the novel issue of whether the breach of an invalid covenant authorizes the withholding of payment by the maker of a note given as consideration for the invalid covenant. The plaintiff sold his interest in an accounting partnership and received promissory notes from the individual partners who acquired his share. The plaintiff brought suit to enforce the notes, and the partners defended on the ground that the plaintiff had violated a covenant not to compete given in exchange for the notes. The court found that the noncompetition agreement constituted an unreasonable restraint of trade and hence was unenforceable; consequently, the defendants could not have recovered monetary damages from the plaintiff for his breach of the agreement, nor could they have obtained an injunction to enforce the covenant.[85] The court nevertheless held that the partial failure of consideration that occurred when the plaintiff reentered the accounting practice entitled the defendants to reduce the unpaid balances due on the promissory notes.[86]

B. Wrongful Termination

In *Hauck v. Sabine Pilots, Inc.*[87], recently affirmed by the Texas Supreme Court, the first crack has been made in the previously impregnable employment-at-will doctrine, which provides that absent a definite term of service

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BASF Wyandotte Corp., 533 S.W.2d 152 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ), in which the court upheld a temporary injunction on very similar facts. The court concluded that the issuance of a temporary injunction in this instance would be purely punitive. *Id.* at 155.

80. 669 S.W.2d 400 (Tex. App.—Dallas 1984, no writ).

81. TEX. R. CIV. P. 93(7).

82. If the denial is not properly sworn, the instrument is received as fully proved. *Id.*

83. 669 S.W.2d at 403.

84. 660 S.W.2d 155 (Tex. App.—Waco 1983, writ ref'd n.r.e.).

85. *Id.* at 159-60.

86. *Id.* at 160. The court concluded that the defendants would not have purchased the plaintiff's interest in the partnership without his agreement to retire permanently from the practice, which meant that the agreement to retire and the promise to pay were dependent covenants. *Id.* The court reasoned that to refuse to allow the defendants to assert failure of consideration would allow the plaintiff to receive the full benefit of his agreement despite his breach of the essential covenant. *Id.* at 161.

87. 672 S.W.2d 322 (Tex. App.—Beaumont 1984), *aff'd*, 28 Tex. Sup. Ct. J. 339 (Apr. 3, 1985).

stated in the employment agreement an employer may terminate an employee at any time, with or without cause.[88] Numerous cases decided during the survey period followed this principle.[89] Based on this well-established line of authority the trial court in *Hauck* granted a summary judgment denying the plaintiff any recovery on his claim for wrongful termination of employment. The court of appeals reversed, holding that an employee states a cause of action, even in the absence of a specific term regarding the length of his employment, if he shows that his termination was the result of his failure to commit an illegal act his employer ordered.[90] Although *Hauck* hardly represents a radical departure from the at-will doctrine, another court of appeals had previously refused to restrict in any way the employer's absolute right to terminate employees at will.[91]

IV. DECEPTIVE TRADE PRACTICES

A. *Definition of Consumer*

Texas courts continue to grapple with the question of who qualifies as a consumer entitled to bring suit under the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA).[92] In *La Sara Grain Co. v. First National Bank*[93] the Texas Supreme Court expounded upon the principles announced in its earlier decision of *Flenniken v. Longview Bank & Trust Co.*[94] regarding the circumstances under which a bank customer is a consumer for purposes of the DTPA. One of La Sara's employees had applied proceeds of company loans from the bank for his personal use. La Sara claimed that the bank's conduct in the transactions was actionable under the DTPA. The court dealt with the unauthorized loans by reaffirming its holding in *Riverside National Bank v. Lewis*,[95] stating that a person who seeks only to borrow money is not a consumer because the lending of money involves neither a good nor a service.[96] The court noted, however, that under its decision in *Flenniken* a lender may be subject to a DTPA claim if the borrower's objective is to purchase or lease a good or service.[97] The court held that this

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88. East Line & Red River R.R. v. Scott, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888).

89. *See, e.g.*, Mitsubishi Aircraft Int'l Inc. v. Maurer, 675 S.W.2d 286, 288 (Tex. App.—Dallas 1984, no writ); Moulder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

90. 672 S.W.2d at 323-24.

91. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 677 (Tex. App.—Austin 1982, writ ref'd n.r.e.), in which the court held that a plaintiff nurse failed to state a claim for wrongful termination when she alleged that she had been fired for complaining about substandard conditions in the nursing home in which she was employed. The court held that the plaintiff stated no claim despite the fact that failure to report the substandard conditions violated TEX. REV. CIV. STAT. ANN. art. 4442c, § 16 (Vernon Supp. 1985), which makes failure to report such conditions a criminal offense. *Id.*

92. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1985).

93. 673 S.W.2d 558 (Tex. 1984).

94. 661 S.W.2d 705, 707-08 (Tex. 1983) (plaintiff who sought loan to buy house is consumer); *see* Hughes, *Torts—Commercial, Annual Survey of Texas Law*, 38 Sw. L.J. 35, 41 (1984).

95. 603 S.W.2d 169 (Tex. 1980) (plaintiff who sought loan was not consumer).

96. *Id.* at 174-75.

97. 673 S.W.2d at 567.

overriding objective would qualify a borrower as a consumer.[98]

Juarez v. Bank of Austin[99] illustates that if a bank extends any services in connection with the extension of credit, the borrower will qualify as a consumer under the DTPA. The defendant bank in *Juarez* had extended two loans to the plaintiff and had provided other services, including the extension of credit insurance and the processing of various medical reports pertaining to the plaintiff's disability. In light of these services, the court held that the plaintiff was a consumer under the DTPA.[100] Similarly, in *Mercantile Mortgage Co. v. University Homes, Inc.*[101] the court held that one who seeks or acquires loan brokerage services qualifies as a consumer.[102]

The court in *First National Bank v. Hackworth*[103] faced a fact situation very similar to that presented in *La Sara*. Hackworth died during the pendency of the action, however, and the court held that her death extinguished any cause of action under the DTPA.[104] The court reasoned that since the DTPA did not contain any provisions regarding the survivability of claims, the court would be forced to apply the common law rule.[105] Under such principles, actions asserting a purely personal right terminate with the death of the aggrieved party, and the right to recover punitive damages is considered to be purely personal.[106] From these established tenets, the court leaped to the questionable conclusion that no actions under the DTPA survive the death of the aggrieved party.[107]

In *Big H Auto Auction, Inc. v. Saenz Motors*[108] the Texas Supreme Court analyzed the legislative history of the DTPA and concluded that a buyer of goods for resale is a consumer who has standing to bring suit under the

98. *Id.*

99. 659 S.W.2d 139 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

100. *Id.* at 142; *see* McCrann v. Klaneckey, 667 S.W.2d 924, 926 (Tex. App.—Corpus Christi 1984, no writ) (insurance is within the category of service under the DTPA).

101. 663 S.W.2d 45 (Tex. App.—Houston [14th Dist.] 1983, no writ).

102. *Id.* at 47-48. As a result, *Riverside National Bank* will only bar a DTPA claim in that rare instance in which a plaintiff brings suit directly against a bank or other lender that has done nothing more than loan to the plaintiff money that is not intended for use to purchase goods or services.

103. 673 S.W.2d 218 (Tex. App.—San Antonio 1984, no writ). Hackworth maintained a checking account with the defendant bank and brought suit to recover sums that she alleged were wrongfully paid from her account on checks that had been forged or altered.

104. *Id.* at 220-21.

105. *Id.*

106. *Id.* at 220; Johnson v. Rolls, 97 Tex. 453, 457, 79 S.W. 513, 514 (1904); Scoggins v. Southwestern Elec. Serv. Co., 434 S.W.2d 376, 379-80 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

107. 673 S.W.2d at 221. Although the court's reasoning may have some merit with respect to an award of treble damages, the court's decision would preclude the recovery of even actual damages to the estate of a deceased party. This result can only be justified by holding that the entire cause of action created under the DTPA is punitive in nature, a conclusion which would be difficult to reach in light of the provisions of the Act itself. Specifically, TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1985) provides that the underlying purpose of the Act is to protect consumers and to provide efficient and economical procedures to secure such protection. As the dissent pointed out, in keeping with this directive one court characterized the DTPA as remedial in nature and not punitive. *See* Ranger County Mut. Ins. Co. v. Guinn, 608 S.W.2d 730, 732 (Tex. Civ. App.—Tyler 1980, writ dism'd).

108. 665 S.W.2d 756 (Tex. 1984).

DTPA.[109] The court held, on the basis of questionable reasoning, that a purchase for resale constitutes a purchase for use within the meaning of the DTPA.[110] If the purchase for resale is "for use," a purchase that would not qualify under this standard is difficult to imagine.

The court's decision in *Superior Trucks, Inc. v. Allen*[111] expanded dramatically the class of persons who qualify as consumers under the DTPA. The plaintiffs in that case were two brothers, Jumel and Richard, who proposed to enter the trucking business. Jumel purchased a truck from the defendant that Richard was to drive for the business. After seven weeks the truck collapsed while Richard was driving, and both brothers joined as plaintiffs in a DTPA suit. Although Jumel alone purchased the truck, the court held that Richard qualified as a consumer as well.[112] The court reasoned that since Richard was the one who was to drive the truck, and since he inspected, test drove, and accepted delivery of the truck, he had sought goods within the meaning of the DTPA and thus had standing to sue under that Act.[113]

In *Wheeler v. Box*[114] the Dallas court of appeals held that a purchaser of a business can qualify as a consumer under the DTPA.[115] Although a business entity itself is an intangible that would not fall within the definition of goods under the DTPA,[116] the plaintiffs in *Wheeler* were franchisees of the defendant and acquired both the business entity itself and tangible personal property and services purchased for use in the operation of the business. The court, therefore, held that the plaintiffs were consumers within the meaning of the DTPA.[117]

B. Notice

Two cases decided during the survey period dealt with the sufficiency of the written notice called for by section 17.50A of the DTPA.[118] In *Hollings-*

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109. *Id.* at 759.

110. *Id*; *see* TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon Supp. 1985) (definition of goods).

111. 664 S.W.2d 136 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

112. *Id.* at 147-48.

113. *Id.* The DTPA defines consumer as including all those who seek or acquire, by purchase or lease, any goods or services. TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon Supp. 1985). Under the court's analysis, any employee who assists his employer in obtaining equipment and who later operates that equipment can bring suit under the DTPA if he subsequently sustains injury due to a defect in the equipment. This unwarranted expansion of the class of potential plaintiffs under the DTPA stems from the erroneous characterization of the plaintiff in *Allen* as one who sought goods. This class of consumers should be limited to those persons who seek actually to purchase or lease goods rather than including those who seek merely to use goods that another will purchase.

114. 671 S.W.2d 75 (Tex. App.—Dallas 1984, no writ).

115. *Id.* at 77-78.

116. TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon Supp. 1985) defines goods as tangible chattels or real property purchased or leased for use.

117. 671 S.W.2d at 77-78.

118. TEX. BUS. & COM. CODE ANN. § 17.50A(a) (Vernon Supp. 1985) requires a plaintiff to provide a potential DTPA defendant with notice of his complaint and the amount of damages and expenses, including attorney's fees, incurred at least 30 days before filing suit.

worth Roofing Co. v. Morrison[119] the plaintiff's demand letter gave timely notice of her intent to seek redress under the DTPA, but rather than specify the amount of damages that she had sustained, the notice merely stated the nature of her claim and that she was in the process of obtaining an estimate of her damages. The court concluded that the written notice must specify the amount of actual damages the complaining party has sustained, and the absence of this information in the present case rendered the plaintiff's notice defective.[120] As a result, the court held that the DTPA entitled the plaintiff to recover actual but not punitive damages.[121]

In *North American Van Lines v. Bauerle*[122] the plaintiff brought suit against the defendant moving company for damage the mover caused to a piano. The plaintiff's DTPA notice stated that the plaintiff's claim resulted from damages occasioned to property the defendant moved. In specifying the violations of the DTPA that had occurred, the letter merely indicated that false, misleading, and deceptive acts and violations of express and implied warranties had occurred. On motion for rehearing the court held that this language was sufficiently detailed to satisfy the requirements of section 17.50A.[123]

C. Substantive Violations

Consumers are authorized to bring suit for money damages under the DTPA whenever a deceptive act or practice that is specifically enumerated in subsection (b) of section 17.46 of the Act constitutes a producing cause of actual damages.[124] The list of deceptive acts specifically enumerated within that section includes representing that an agreement confers rights that it does not actually confer or that are prohibited by law.[125] Plaintiffs have attempted to use this provision to transform suits for simple breach of contract into DTPA actions. The Texas Supreme Court has resisted this attempted expansion of the DTPA by stating unequivocally that an allegation of a mere breach of contract, without more, does not constitute a violation of the DTPA.[126] This conclusion stems from the fact that the rights that arise out of a contract are the right to demand performance or the right to bring suit for damages in the event the other part refuses to comply with the contract's terms. A party still possesses these rights when the other party to the agreement fails to perform. Consequently, entering into the original agreement does not constitute a representation that the agreement involves rights that it does not have simply because the other party later fails to perform.[127]

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119. 668 S.W.2d 872 (Tex. App.—Fort Worth 1984, no writ).
120. *Id.* at 875.
121. *Id.*
122. No. 2-83-188-CV (Tex. App.—Fort Worth, Sept. 13, 1984, writ ref'd n.r.e.) (not yet reported).
123. *Id.*, slip op. at 13-14.
124. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon Supp. 1985).
125. *Id.* § 17.46(b)(12).
126. Ashford Dev., Inc. v. USLife Real Estate Serv. Corp., 661 S.W.2d 933, 935 (Tex. 1983).
127. *See* Juarez v. Bank of Austin, 659 S.W.2d 139, 141 (Tex. App.—Austin 1983, writ

Several cases decided during the survey period illustrate the circumstances under which a complaining party can invoke the provisions of section 17.46(b)(12).[128] In *Tidelands Life Insurance Co. v. Harris*[129] the plaintiff pursued a claim under the DTPA based upon the defendant insurance company's failure to pay health insurance benefits. During the course of completing an application for the policy the plaintiff had informed the insurance company's agent that he had a heart problem. The agent advised him that future heart problems would be covered under the health insurance policy. The plaintiff subsequently suffered a heart attack, and the insurance company denied coverage on the basis of the policy's preexisting condition clause. The court held that by representing that the policy would cover a condition that it clearly did not, the defendant had represented that the contract of insurance conferred rights that it did not actually grant, which was actionable under the DTPA.[130]

In *Citizen State Bank v. Bowles*[131] the plaintiff alleged that the defendant bank represented that it had the authority to convey the property that was the subject of a contract of sale. After the plaintiff entered into a contract to purchase the property, third parties who held a right of first refusal exercised the right, and the bank thus lacked the power to convey the property to the plaintiff. The court held this failure to convey was actionable under the DTPA.[132]

The court in *Watson v. Bettinger*[133] took a different approach in transforming a simple breach of contract into a deceptive trade practice. The defendant builder entered into a contract to sell a home to the plaintiff. The contract provided that latent defects were to be repaired completely prior to closing. The builder attempted to make the repairs, but was unable to do so. The builder had made no representations of any kind to the plaintiff. The plaintiff relied solely upon the language contained within the contract to support his cause of action. Although the defendant's failure to perform would be merely an actionable breach of contract, the court, through tor-

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ref'd n.r.e.), discussed *supra* note 99 and accompanying text. For example, if a party at the time of making an agreement to sell Blackacre represents to the other party that the contract gives him the right to purchase Blackacre, a subsequent failure to convey the property does not become actionable as a misrepresentation that the contract conferred rights that it did not have. After the breach the purchaser still has the right to bring suit to enforce the agreement. If, however, the seller were to enter into an agreement to sell Blackacre and were to represent to the purchaser that the agreement included Whiteacre when it did not, this misrepresentation could be actionable as a representation that the contract involves rights that it does not have.

128. TEX. BUS. & COM. CODE ANN. § 17.46(b)(12) (Vernon Supp. 1985).

129. 675 S.W.2d 224 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

130. *Id.* at 226.

131. 663 S.W.2d 845 (Tex. App.—Houston [14th Dist.] 1983, writ dism'd).

132. *Id.* at 849. The court's decision is difficult to reconcile with the principles established by previous decisions. The contract that was the subject of the suit covered the property that the plaintiff sought to purchase, and upon the defendant's refusal to convey the plaintiff still possessed the right to bring suit under the contract. The court should have invoked the principle that a mere breach of contract is not actionable as a deceptive trade practice, and limited the plaintiff to his contractual remedy. *See supra* text accompanying note 126.

133. 658 S.W.2d 756 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

tured reasoning, affirmed the jury's finding that the agreement to repair the house by the time of closing constituted a misrepresentation regarding the characteristics or qualities of the house.[134]

The DTPA also authorizes consumers to bring suit when they have been damaged by a breach of an express or implied warranty.[135] In a case involving an express warranty of the suitability of a truck for a particular purpose, the court in *Superior Trucks, Inc. v. Allen*[136] reformed and affirmed a judgment in favor of the plaintiff.[137] The court had more difficulty in finding an express warranty in *Appleby v. Hendrix*.[138] The defendant placed a magazine advertisement offering to sell stallions. The advertisement stated that these stallions created an opportunity for those who wished to acquire top bloodlines for sensible prices. The court interpreted this statement to be an expression that the bloodlines were to continue and thus constituted an express representation that the horses described in the advertisement were fertile.[139] Consequently, the court allowed a purchaser of an infertile horse to bring suit under the DTPA for breach of this express warranty.[140]

Two other cases decided during the survey period dealt with actionable breaches of implied warranties. In *Horta v. Tennison*[141] and in *Keller v. Judd*[142] two different courts of appeals held that a seller of an automobile who does not have a good title breaches an implied warranty of title under the UCC.[143] Purchasers in both cases thus were allowed to maintain actions under the DTPA.[144]

In *La Sara Grain Co. v. First National Bank*[145] the court considered whether the defendant bank's act of paying checks in violation of a dual-signature requirement violated any implied warranties. Although the court confirmed that owners of checking accounts are consumers and as such have standing to pursue a DTPA claim, the court found no authority for the proposition that a bank's agreement not to pay checks on unauthorized sig-

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134. *Id.* at 759. Such representations are actionable under TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Vernon Supp. 1985). The court held that the agreement to make the necessary repairs constituted a representation that such repairs were capable of being performed within the time specified. 658 S.W.2d at 759. Since the repairs could not be performed within the time provided, the court held that the implied representation that the home could be repaired was false. *Id.* Consequently, the court held that the defendant had misrepresented the characteristics or qualities of the house, *i.e.*, the "repairability" of the house. *Id.* The effect of the court's ruling is that any time a party agrees to perform repairs to an object prior to conveying that object, if it later turns out that the repairs were not capable of being performed, the act of entering into the agreement will itself constitute a deceptive trade practice.

135. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon Supp. 1985).

136. 664 S.W.2d 136 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

137. *Id.* at 141-42.

138. 673 S.W.2d 295 (Tex. App.—Beaumont 1984, no writ).

139. *Id.* at 298-99.

140. *Id.*

141. 671 S.W.2d 720 (Tex. App.—Houston [1st Dist.] 1984, no writ).

142. 671 S.W.2d 604 (Tex. App.—San Antonio 1984, no writ).

143. *Horta*, 671 S.W.2d at 723-24; *Keller*, 671 S.W.2d at 604; TEX. BUS. & COM. CODE ANN. § 2.312 (Tex. UCC) (Vernon 1968) (seller of goods warrants good title).

144. *Horta*, 671 S.W.2d at 723-24; *Keller*, 671 S.W.2d at 607-08.

145. 673 S.W.2d 558 (Tex. 1984); *see supra* notes 93-98.

natures rises to the level of a warranty.[146] The court, therefore, limited the plaintiff to a breach of contract claim and reversed the award of treble damages under the DTPA.[147]

The DTPA also authorizes a consumer to bring suit if he has been victimized by an unconscionable action or course of action.[148] Unconscionable action includes an act that results in a gross disparity between the value received and the consideration paid by a consumer.[149] In *Diversified Human Resources Group, Inc. v. PB-KBB, Inc.*[150] the court held that the plaintiff had been victimized by an unconscionable course of action when the defendant employment agency, with whom the plaintiff had contracted to provide a graduate engineer, put the plaintiff in contact with an applicant who later turned out to have no degree.[151] The court ordered the agency to return the consideration the plaintiff had paid even though the agency had no knowledge that the applicant had lied about his educational background.[152]

In *Vick v. George*[153] the court held that purchasers of interests in an oil and gas lease that turned out to be worthless could maintain a DTPA claim for the defendant's unconscionable action.[154] Since the interests were worthless, the court held that a gross disparity existed between the consideration given and the benefit the plaintiffs received.[155] Finally, in *Koonce v. Chastain*[156] the court reversed a judgment awarding the plaintiffs damages that the defendant's unconscionable action allegedly caused.[157] In *Koonce* the plaintiffs purchased real property from the defendant seller, who had represented that the adjoining property would be used strictly for residential purposes. The adjacent property was developed for commercial purposes, however, and the plaintiffs' expert witness testified that this commercial use diminished the value of the plaintiffs' property. Although the expert's testimony established that the property purchased from the defendant had not appreciated to the level that it would have if the use of adjoining property had been limited as the defendant had represented, the court found no evidence of a gross disparity between the consideration paid and the value of the property at the time of purchase.[158]

D. Persons Who Are Liable

In *Wheeler v. Box*[159] the Dallas court of appeals cited well-established

146. 673 S.W.2d. at 565.
147. *Id.* at 567-68.
148. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon Supp. 1985).
149. *Id.* § 17.45(5)(b).
150. 671 S.W.2d 634 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).
151. *Id.* at 636-37.
152. *Id.*
153. 671 S.W.2d 541 (Tex. App.—San Antonio 1983, no writ).
154. *Id.* at 550.
155. *Id.*
156. 674 S.W.2d 484 (Tex. App.—El Paso 1984, writ granted).
157. *Id.* at 486.
158. *Id.*
159. 671 S.W.2d 75 (Tex. App.—Dallas 1984, no writ).

precedent[160] in support of the proposition that an agent is personally liable for his own torts. The court thus concluded that an agent or officer of a corporation who makes misrepresentations to a consumer solely in the furtherance of the business of his employer is personally liable for the misrepresentations.[161] In *George D. Thomas Builder, Inc. v. Timmons*[162] the court considered the extent to which a principal can be held responsible for misrepresentations a real estate agent has made. The purchaser of a home found that the real estate agent had overstated the home's square footage and sued both the agent and the builder-seller. The issue presented was the extent to which the builder-seller, who made no representations, could be held liable for the agent's misrepresentation. The court held that since the real estate agent was a special agent with no implied authority to make representations with respect to the quality of the property sold, the builder-seller could not be held liable for additional penalities provided under the DTPA.[163] The court nevertheless held the builder-seller liable for actual damages, citing a Texas Supreme Court case that predated the enactment of the DTPA.[164]

The court in *Potere, Inc. v. National Realty Service*[165] expanded the list of persons who can be held liable for a DTPA violation. In *Potere* the plaintiff purchased a real estate franchise from Matchmaker. Under the franchise agreement, the franchisee could submit homes for Matchmaker's purchase if the property had not been sold durings its listing period. When Matchmaker refused to purchase the house, the plaintiff brought suit under the DTPA against both Matchmaker and Potere, a related entity. Potere appealed a judgment entered against it, claiming that it could not be held responsible for the conduct of Matchmaker.

The appellate court held that Potere could be held liable for the DTPA violations of Matchmaker despite the fact that the two had no principal-agency relationship.[166] The court reasoned that the DTPA allows a consumer to bring suit against any person for false, misleading, or deceptive acts.[167] Furthermore, the Act defines "person" to mean "an individual,

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160. *See* Light v. Wilson, 663 S.W.2d 813, 815 (Tex. 1983) (Spears, J., concurring), and cases cited therein.

161. *Wheeler*, 671 S.W.2d at 79.

162. 658 S.W.2d 194 (Tex. App.—El Paso 1983, writ ref'd n.r.e.).

163. *Id.* at 197.

164. *Id*; *see* Loma Vista Dev. Co. v. Johnson, 142 Tex. 686, 691, 180 S.W.2d 922, 924 (1944) (seller liable for agent's unauthorized misrepresentation). No statutory basis exists for applying the substantive provisions of the DTPA and yet refusing to award the relief provided under the Act. The court attempted to justify its holding by referring to TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1968 & Supp. 1985), which imposes liability upon a person who even unknowingly benefits from a false representation made by another in order to induce a person to purchase real estate or securities. Reliance upon § 27.01 would be understandable if the plaintiff had pleaded or proved a cause of action based upon this statute, but the plaintiff had limited his case to a DTPA claim and a negligence claim. The use of principles applicable to an unpleaded cause of action to define the relief available under the DTPA is difficult to understand. If the defendant's conduct is actionable under the DTPA, then the plaintiff should be able to seek recovery of all of the relief provided by the Act; otherwise, the plaintiff should be denied any recovery on his DTPA claim.

165. 667 S.W.2d 252 (Tex. App.—Houston [14th Dist.] 1984, no writ).

166. *Id.* at 257-58.

167. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon Supp. 1985).

partnership, corporation, association, or other group, however organized."[168] The court held that the phrase "other group, however organized" indicated an intent to extend liability beyond traditional business organizations.[169] The court stated that "[w]hen two or more entities develop a [sic] extensive relationship, even though the combination falls short of a traditional business organization, each entity may be held responsible for the acts and representations of the other entity or entities."[170] Since Potere and Matchmaker had entered into several agreements pursuant to which they were jointly involved in the Matchmaker Home Equity program, the court held that Potere could be held liable for the DTPA violations of Matchmaker.[171] The court concluded that their relationship was so close that Potere and Matchmaker were inextricably intertwined, with the result that they were both liable for the DTPA violations.[172]

The court's decision in *Potere* contrasts with the decision in *Chambless v. Barry Robinson Farm Supply, Inc.*[173] In *Chambless* the plaintiff brought a DTPA suit against both the dealer who sold him a tractor and the tractor's manufacturer. The court affirmed a directed verdict in favor of the manufacturer on the ground that the plaintiff failed to establish any agency relationship between it and the dealer.[174] The court held that, absent a showing of agency, the manufacturer could not be found liable for any representations made by the dealer.[175] The court did not discuss the definition of "person" found in the DTPA.

E. Defenses

Several cases decided during the survey period considered the statutory defenses available under the DTPA. Section 17.50A of the Act provides a means by which a defendant may limit his liability under the DTPA.[176] In *Cail v. Service Motors, Inc.*[177] the Texas Supreme Court demanded strict compliance with the procedures set forth in section 17.50A before a defendant could invoke the protections of that section. In *Cail* the plaintiff purchased a truck that was not as the defendant had represented. The plaintiff then sent a DTPA demand letter alleging $4,500 in actual damages and

168. *Id.* § 17.45(3).
169. 667 S.W.2d at 256-57.
170. *Id.* at 256.
171. *Id.* at 256-57.
172. *Id.*
173. 667 S.W.2d 598 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).
174. *Id.* at 603.
175. *Id.*
176. TEX. BUS. & COM. CODE ANN. § 17.50A (Vernon Supp. 1985) requires a consumer to give written notice to the defendant of his specific complaint at least thirty days prior to filing suit. *See supra* notes 118-23 and accompanying text. Within 30 days thereafter the defendant may tender a written offer of settlement to the consumer, including an offer to reimburse the consumer for his attorney's fees incurred to the date of the notice, and thereby avoid legal action. *Id.* § 17.50A(c). If the settlement offer is rejected and the court finds that the offer is substantially the same as the actual damages the trier of fact found, the DTPA limits the consumer's recovery to the amount tendered or as found by the trier of fact, whichever is less. *Id.* § 17.50A(d).
177. 660 S.W.2d 814 (Tex. 1983).

$250 attorney's fees. The defendant offered to pay $4,030 less $.08 per mile or $4.33 per day for each day the plaintiff had used the truck. The plaintiff rejected this offer and recovered only $3,000 in actual damages at trial. The court, however, refused to allow the defendant to rely upon section 17.50A as a defense because the settlement offer had failed to include expressly within its terms the plaintiff's attorney's fees.[178] The court's decision appears overly technical and contrary to the spirit behind section 17.50A.

The court in *Chambless v. Barry Robinson Farm Supply, Inc.*[179] also took a strict approach in holding that section 17.50A was not available to the defendant. The plaintiff served an adequate written notice complaining of the purchase of a tractor from the defendant, and the defendant responded by orally offering to buy back the tractor. Since the defendant had not made the offer in a writing, however, the court held that the defendant had not satisfied the requirements of section 17.50A and its provisions were not available.[180]

In *Stendebach v. Campbell*[181] and *General Motors Corp. v. Ramsey*[182] the courts considered two defenses that were available to defendants prior to the enactment of the 1979 amendments to the DTPA.[183] In the *Stendenbach* decision the jury found that the defendant's misrepresentations were the result of a bona fide error. The court held that the defense of bona fide error applies only to clerical errors, such as typographical errors or mistakes in computations.[184] In *Ramsey* the court held that the defendant who sold a truck to the plaintiff was entitled to the submission of an issue inquiring whether the defendant cured a defect in the vehicle prior to the date the suit was filed.[185] Although on its face the statutory defense applies only when a defendant establishes that he was not given a reasonable opportunity to cure,[186] the court held that the defense would also apply in a case in which the defendant had actually cured the defect about which the plaintiff

178. *Id.* at 815. Even though the amount offered exceeded the combination of both the actual damages as found by the jury and the attorney's fees demanded in the letter, the failure to designate a portion of the offer as being for reimbursement of attorney's fees rendered the offer ineffective. *Id.*

179. 667 S.W.2d 598, 602 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

180. *Id.*

181. 665 S.W.2d 557 (Tex. App.—El Paso 1984, writ ref'd n.r.e.).

182. 669 S.W.2d 824 (Tex. App.—Tyler 1984, writ granted).

183. *See* Deceptive Trade Practices—Consumer Protection Act—Definitions, Relief, Defenses, Legislative Intent, ch. 216, §§ 1-14, 1977 Tex. Gen. Laws 600-05, *amended by* Deceptive Trade Practices—Consumer Protection, ch. 603, §§ 1-10, 1979 Tex. Gen. Laws 1327-32. Section 17.50A(1) provided a defense against treble damages upon a showing that the alleged conduct was the result of a bona fide error. 1977 Tex. Gen. Laws at 604. Section 17.50A(2) provided a similar defense upon a showing that the plaintiff did not afford the defendant an opportunity to cure a breach of warranty. *Id.* Under the current version of the DTPA, if any part of the plaintiff's cause of action arose prior to the effective date of the amendments to the statute, the prior statutory provisions control. ABC Truck Rental v. Southern County Mut. Ins. Co., 662 S.W.2d 132, 134-35 (Tex. App.—San Antonio 1983, no writ).

184. 665 S.W.2d at 559. The bona fide error defense is no longer available.

185. *See Ramsey*, 669 S.W.2d at 824.

186. *Id.* at 824-25.

complained.[187]

The court in *Jernigan v. Page*[188] allowed a defendant to rely upon a defense not specified within the DTPA itself. The defendant sold a parcel of land to a third party by a contract for deed, and the third party conveyed the property to the plaintiffs. When the third party defaulted on the note given in payment for his purchase from the defendant, the defendant foreclosed on the property and purchased the land at the foreclosure sale. The defendant than demanded that the plaintiffs purchase the land from the defendant if they desired to maintain possession. The plaintiffs alleged that the series of events constituted an unconscionable action or course of action on the part of the defendant and sought damages under the DTPA. The court held that since the defendant had properly recorded his interest in the real estate, the plaintiffs as a matter of law had notice of the defendant's claim.[189] The court held that the notice provided by filing the instrument was a defense to an action under the DTPA, noting that the plaintiffs were not deceived by the defendant in any way, but rather had suffered a loss as the result of their own lack of diligence.[190] Similarly, in *Hernandez v. Telles*[191] the court allowed a defendant to rely upon a defense not set out in the DTPA. The court affirmed a take-nothing judgment in favor of the defendant based upon jury findings that the plaintiff had agreed to a compromise and settlement of its claims.[192]

The court in *Joseph v. PPG Industries, Inc.*[193] took a much narrower view of the defenses available under the DTPA. The plaintiff in *Joseph* hired a general contractor to build a commercial building, and the contractor entered into an agreement to purchase the windows from PPG. After installation of the windows, the contractor abandoned the job without paying PPG. The windows turned out to be defective, and the plaintiff sued PPG under the DTPA. PPG had offered the contractor only a limited warranty, the terms of which limited PPG's obligation to the provision of replacement units. PPG offered to provide the units, but the plaintiff insisted that PPG pay for installation as well. The trial court directed a verdict in favor of PPG, relying upon the failure of consideration that occurred when PPG was not paid for the windows. Acknowledging the fairness of the lower court's judgment, the court of appeals nevertheless concluded that the fact that the defendant never received payment for the goods did not affect the plaintiff's

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187. *Id.* at 825. The opportunity to cure defense is also no longer available.

Editor's Note: After this Article went to print, the Texas Supreme Court ruled on the *Ramsey* case, affirming in part and reversing in part the opinion of the court of appeals. General Motors Corp. v. Ramsey, 28 Tex. Sup. Ct. J. 218 (Jan. 30, 1985).

188. 662 S.W.2d 760 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

189. *Id.* at 762. TEX. REV. CIV. STAT. ANN. art. 6646 (Vernon 1969) provides that a properly recorded instrument shall be held as notice to all persons of its existence.

190. 662 S.W.2d at 763.

191. 663 S.W.2d 91 (Tex. App.—El Paso 1983, no writ).

192. *Id.* at 93. Since the plaintiff had agreed to return the defective merchandise in exchange for a full refund, and since the defendant was ready, willing, and able to perform its part of the agreement, the court barred the plaintiff from subsequently breaching the compromise agreement and seeking damages under the DTPA. *Id.*

193. 674 S.W.2d 862 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

status as a consumer.[194]

Plaintiffs often rely upon section 17.42[195] as a bar to asserted defenses. The plaintiff in *Ellmer v. Delaware Mini-Computer Systems, Inc.*[196] sought to rely upon this provision to defeat a limitation of warranty contained in its contract with the defendant. The court held that the waiver was sufficient to comply with the Uniform Commercial Code requirements.[197] Relying upon Texas Supreme Court authority,[198] the court held that the limitation was enforceable despite the provisions of section 17.42.[199] The court in *Commerce Park v. Mardian Construction Co.*[200] reaffirmed the principle that the Federal Arbitration Act[201] preempts the nonwaiver provision of the DTPA.[202] As a result, the Fifth Circuit affirmed the trial court's order staying the plaintiff's DTPA suit until arbitration had been completed in accordance with the terms of the parties' contract.[203]

F. Damages

In *Luna v. North Star Dodge Sales, Inc.*[204] the Texas Supreme Court clarified the circumstances under which a plaintiff will be allowed to recover damages for mental anguish caused by DTPA violations. The supreme court held that a finding that a DTPA violation was committed knowingly was sufficient to support an award of mental anguish damages.[205] The court in *Luna* also clarified a damage question of general interest by finding that a plaintiff is entitled to recover damages for loss of use of an automobile despite the fact that the plaintiff has not expended any money for alternative

194. *Id.* at 865-66. The court noted that the defense of failure of consideration is a common law defense, which the court refused to allow to defeat a claim under the DTPA. The court's apparent belief that only those defenses specifically enumerated within the Act are available in a DTPA case is inconsistent with the decisions in *Jernigan* and *Hernandez*, and the holding certainly caused an inequitable result in *Joseph. Id.*

195. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 1985). The section provides that waivers by consumers of the provisions of the DTPA are unenforceable and void, except when the consumer is engaged in business and has substantial assets.

196. 665 S.W.2d 158 (Tex. App.—Dallas 1983, no writ).

197. TEX. BUS. & COM. CODE ANN. § 2.316(b) (Tex. UCC) (Vernon 1968) (waiver of warranty of merchantability must mention warranty and be conspicuous; waiver of fitness must be conspicuous).

198. *See* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393-94 (Tex. 1982).

199. 665 S.W.2d at 160-61.

200. 729 F.2d 334 (5th Cir. 1984).

201. 9 U.S.C. §§ 1-14 (1982).

202. For a discussion of the principle, see Hughes, *supra* note 94, at 43-44.

203. 729 F.2d at 337-38.

204. 667 S.W.2d 115 (Tex. 1984).

205. *Id.* at 117. The court reiterated that at common law mental anguish damages are recoverable whenever there is proof of a willful tort, willful and wanton disregard of the plaintiff's rights, or gross negligence. *Id.* Since gross negligence is a less culpable state of mind than knowing conduct, the court held that to award mental anguish damages to a plaintiff who establishes knowing conduct on the part of the defendant is proper. Consequently, the same jury finding that authorizes an award of discretionary damages under the DTPA will also justify an award of damages for mental anguish. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1985); Miller v. Dickenson, 677 S.W.2d 253, 259-60 (Tex. App.—Fort Worth 1984, no writ) (finding of knowing violation will support mental anguish damages).

transportation.[206] In so holding, the court expressly disapproved well-established precedents to the contrary.[207]

In *Martin v. McKee Realtors, Inc.*[208] the Texas Supreme Court held that to recover discretionary damages a plaintiff in a jury trial must obtain a jury finding regarding the amount of such damages.[209] The plaintiff had obtained a jury finding that the defendant had acted knowingly, and based upon this finding the trial court had awarded discretionary damages. The supreme court affirmed the holding of the court of appeals that the plaintiff must request a jury issue on the amount of the discretionary damages, and the failure to do so amounted to a waiver.[210] The manner of submitting DTPA damage issues to a jury was also the subject of the Amarillo court of appeals' opinion in *Chrysler Corp. v. McMorries*.[211] The issue the trial court submitted merely inquired as to the amount of money that would fairly and reasonably compensate the plaintiff for his actual damages and did not instruct the jury as to the proper elements to be considered. The court of appeals found this omission was reversible error, holding that the trial court's charge must limit the jury's consideration to facts that are properly a part of the damages allowable under the controlling legal principles.[212]

The *McMorries* court went on to discuss in detail the proper measure of damages to be applied in the case. The court noted that the damages recoverable under the DTPA are construed to mean those damages that are recoverable at common law.[213] Since McMorries alleged that Chrysler had made various misrepresentations regarding the automobile he purchased, the court held that the damages should be viewed in terms of both a common law tort action for fraudulent misrepresentation and a common law contract action for breach of warranty.[214] Since the plaintiff had alleged conduct on the part of the defendant that fitted the description of both a tort and a contract action, the court held that the jury should determine the damages sustained under both the out-of-pocket measure and the loss-of-bargain rule.[215] In keeping with the principle that the DTPA was intended to permit the adversely affected consumer to recover the greatest amount of actual damages

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206. 667 S.W.2d at 118-19.

207. *See, e.g.*, American Standard County Mut. Ins. Co. v. Barbee, 262 S.W.2d 122, 124 (Tex. Civ. App.—Fort Worth 1953, no writ); Finley v. Beck, 16 S.W.2d 908, 909 (Tex. Civ. App.—Fort Worth 1929, no writ).

208. 663 S.W.2d 446 (Tex. 1984).

209. *Id.* at 447-48.

210. *Id.* at 448.

211. 657 S.W.2d 858 (Tex. App.—Amarillo 1983, no writ).

212. *Id.* at 864-65.

213. *Id.* at 864.

214. *Id.* at 864-65. Under the tort measure of damages, a plaintiff is allowed to recover his out-of-pocket loss, which is measured by the difference between the price paid and the value of the object received. *Id.* at 864. On the other hand, in a contract action the proper measure of damages compensates the plaintiff for the loss of his bargain. Under this rule, the plaintiff is allowed to recover the difference between the value of the goods as warranted and their value as received. *Id.* at 864-65.

215. *Id.*

he has alleged and established by proof,[216] the court held that the plaintiff should recover the greater of the two measures as found by the jury.[217]

As the Dallas court of appeals' opinion in *Heritage Housing Corp. v. Ferguson*[218] illustrates, a different measure of damages is applied when the plaintiff's complaint arises out of a breach of warranty incident to the construction and sale of a house as opposed to a sale of goods. The plaintiff alleged that the house she purchased was not built as represented. The court held that in construction cases brought under the DTPA actual damages may be based on the cost of repairs, or, when correction of defects would require uneconomical charges or expenses, the difference between the value of the structure as built and the value it would have had if built without defects.[219] The court held that under this rule the plaintiff was entitled to the remedial cost or the difference in value, whichever was less.[220]

The plaintiff, however, must elect which measure to plead and prove. The plaintiff in *Ferguson* limited her proof to the difference in value of the house as built and the value the house would have had if it had been built without defects. The court held that the burden then shifted to the defendant, if it was dissatisfied with that measure of damages, to prove that the remedial cost would have been less.[221] Because the defendant had failed to produce any evidence regarding the cost of repair, the trial court had not erred in awarding the plaintiff damages in an amount equal to the difference in value of the house as received and as warranted.[222]

The court in *Precision Homes, Inc. v. Cooper*[223] also considered the correct measure of damages to be applied when a plaintiff's DTPA claim arises out of a construction contract. The court held that the measure of damages is dependent upon the state of completion of the contract.[224] If the contractor has substantially complied with the contract, the plaintiff is limited to the cost of repair as a measure of damages.[225] If the contractor has not substantially complied with the contract, the plaintiff is entitled to cover the difference in value between the structure as warranted and as received.[226]

The court's reasoning in *Cooper* more closely parallels the general rule applied in construction contract cases than the court's opinion in the *Ferguson*

216. Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

217. 657 S.W.2d at 865.

218. 674 S.W.2d 363 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

219. *Id.* at 366; *see* Miller v. Dickenson, 677 S.W.2d 253, 258 (Tex. App.—Fort Worth 1984, no writ).

220. 674 S.W.2d at 366-67.

221. *Id.*

222. *Id.*

223. 671 S.W.2d 924 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

224. *Id.* at 927.

225. *Id.*

226. *Id.* In determining whether a contractor has substantially complied with a contract, the court held that the trier of fact must determine what corrective work would be necessary to obtain full compliance. If the entire structure must be changed, or if the corrective work will result in damage to other parts of the building, or if the expense of such repair will be uneconomical, then the contractor has not substantially performed the contract. *Id.*

son case. When defects in construction can be remedied without impairing the building as a whole, the measure of damages is usually the reasonable cost of remedying the defects.[227] If, however, the contractor cannot remedy the defects without injury to the building or without expenditure for reconstruction that is disproportionate to the benefit obtained, then damages are measured by the difference between the value of the building as it is and as it would have been if built in conformity with the contract.[228] Since these principles have controlled at common law, they also should be applied in DTPA cases.[229] In *Wolfe Masonry, Inc. v. Stewart*[230] the court of appeals reaffirmed the proposition that any allowable set-off to the DTPA claim must be subtracted from the plaintiff's damages prior to trebling.[231]

G. Attorney's Fees

A number of cases decided during the survey period considered the circumstances under which a defendant is authorized to recover attorney's fees for defending against a DTPA claim.[232] In its denial of the writ of error in *Schott v. Leissner*[233] the Texas Supreme Court held that a defendant is entitled to recover his attorney's fees on a finding of either harassment or that the suit was groundless and brought in bad faith.[234] The court did not approve the court of appeals' holding that issues of bad faith and harassment are to be submitted to the jury.[235] Since the appeal did not present that issue, the court reserved judgment on the question of whether the trial court must make all findings required by section 17.50(c).[236] Such a holding would seem to be consistent with the wording of the Act, which refers only to a finding by the court and not to a finding by the trier of fact.[237]

227. *See* New Home Constr. Corp. v. O'Neill, 373 S.W.2d 798, 800 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

228. *See* Tarrant County v. Butcher & Sweeney Constr. Co., 443 S.W.2d 302, 307 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.).

229. *See* Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 939 (Tex.), *cert. denied*, 449 U.S. 1015 (1980) (damages recoverable under DTPA are common law damages). The court in *Cooper* also disapproved the Dallas court of appeals' holding in Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., 602 S.W.2d 282, 298 (Tex. Civ. App.—Dallas 1980, no writ), to the effect that prejudgment interest is an item of damage that should be trebled in accordance with the terms of the DTPA. Instead, the court in *Cooper* held that prejudgment interest should be awarded from the date of the injury strictly on the actual damages that have been sustained and not on the trebled damages. *Cooper*, 671 S.W.2d at 930-31.

230. 664 S.W.2d 102 (Tex. App.—Corpus Christi 1983, no writ).

231. *Id.* at 104; *see, e.g.*, Smith v. Baldwin, 611 S.W.2d 611, 617 (Tex. 1980); Beeman v. Worrell, 612 S.W.2d 953, 956-57 (Tex. Civ. App.—Dallas 1981, no writ).

232. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon Supp. 1985) provides: "On a finding by the court that an action under this section was groundless and brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorney's fees and court costs."

233. 659 S.W.2d 752 (Tex. App.—Corpus Christi 1983), *writ ref'd n.r.e. per curiam*, 668 S.W.2d 686 (Tex. 1984).

234. 668 S.W.2d at 686-87.

235. *Id.*

236. *Id.*

237. Decisions of the courts of appeals have generally adopted the view that the question of whether a suit is groundless is for the court to decide, but that issues of bad faith and harassment should be submitted to the jury. *See* Pope v. Darcey, 667 S.W.2d 270, 274 (Tex. App.—

The court in *Pope v. Darcey*[238] allowed a defendant to recovery attorney's fees for a bad faith DTPA claim even though the plaintiff dropped his DTPA claims prior to trial.[239] The court noted that the DTPA only requires that a suit be *brought* in bad faith or for purposes of harassment in order for one to be liable for a defendant's attorney's fees, not that the DTPA claim be prosecuted to its conclusion.[240] The court went on to hold that the defendants were entitled to recover their attorney's fees incurred after the DTPA claims were dismissed.[241] Thus, the DTPA entitles a defendant to recover fees incurred both in the defense of the plaintiff's DTPA claim and in the prosecution of the defendant's counterclaim for attorney's fees. Similarly, in *Molinar v. Plains Insurance Co.*[242] the court allowed a defendant to pursue its counterclaim for attorney's fees after the plaintiff took a nonsuit of its DTPA claim.

In *McKinley v. Drozd*[243] the supreme court resolved a conflict among the courts of appeals on the issue of whether a DTPA claimant faced with a counterclaim must obtain a net recovery in order to recovery attorney's fees.[244] Drozd, a general contractor, brought suit against the McKinleys to recover the balance due on a construction contract. The McKinleys counterclaim alleged, among other things, violations of the DTPA. The jury found for Drozd in the amount of $24,836.71 and for the McKinleys in the amount of $7,500 for Drozd's violation of the DTPA. The trial court awarded attorney's fees to both parties. The court of appeals reversed the award to the McKinleys, holding that they were not entitled to any attorney's fees because they did not receive a net recovery.[245]

Consistent with the legislative mandate to construe the DTPA liberally in order to protect consumers,[246] the supreme court reversed, concluding that a party who obtains a DTPA recovery is entitled to attorney's fees even though the opposing party's claim entirely offsets the DTPA recovery.[247] The court commented upon its earlier holding that offsets against DTPA

Houston [14th Dist.] 1984, writ ref'd n.r.e.); Parks v. McDougall, 659 S.W.2d 875, 876 (Tex. App.—San Antonio 1983, no writ); La Chance v. McKown, 649 S.W.2d 658, 661 (Tex. App.—Texarkana 1983, writ ref'd n.r.e.). In fact, the court in *Parks v. McDougall* held that it was reversible error for a trial court to rule on the existence of bad faith or purposes of harassment in a case that had been submitted to the jury. 659 S.W.2d at 876.

238. 667 S.W.2d 270 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

239. *Id.* at 272-73.

240. *Id.* at 273.

241. *Id.* at 274.

242. 660 S.W.2d 845, 849-50 (Tex. App.—Amarillo 1983, no writ).

243. 28 Tex. Sup. Ct. J. 190 (Jan. 12, 1985).

244. *Compare* Guerra v. Brumlow, 630 S.W.2d 425, 430-31 (Tex. App.—San Antonio 1982, no writ) (DTPA recovery justifies award of attorney's fees, even if recovery entirely offset by counterclaim), *with* Widmer v. Stamps, 663 S.W.2d 875, 882-83 (Tex. App.—Houston [14th Dist.] 1983, no writ) (DTPA claimant must obtain net recovery to recovery attorney's fees).

245. 670 S.W.2d 405, 406 (Tex. App.—Corpus Christi 1984), *rev'd*, 28 Tex. Sup. Ct. J. 190 (Jan. 12, 1985).

246. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1985).

247. 28 Tex. Sup. Ct. J. at 191.

recoveries are deducted before trebling the damages.[248] The court noted that the different policy grounds underlying the award of punitive treble damages and the award of attorney's fees justified the differing treatment.[249]

A number of cases during the survey period dealt with the amount of attorney's fees to which a prevailing plaintiff is entitled. In *Doerfler v. Espensen Co.*[250] the court held that an award of attorney's fees is mandatory in a case in which a plaintiff establishes his right to recover under the DTPA.[251] The trial court correctly set aside the jury's findings that the reasonable amount of attorney's fees the plaintiff incurred was zero. The trial court was not justified in substituting its finding as to the reasonable amount of attorney's fees for that of the jury, however, and the court reversed the case and remanded for a separate trial on the reasonable amount of attorney's fees to be awarded.[252]

In *Jack Roach Ford v. De Urdanavia*[253] the court of appeals ordered a remittitur after the plaintiff recovered $28,500 in attorney's fees and only $500 in actual damages. The court held that an award of $20,000 would be appropriate under the circumstances.[254] The court in *Terminix International, Inc. v. Lucci*[255] took an exceedingly niggardly view of what constitutes reasonable attorney's fees. The court found the trial court's conditional award of $7,500 for attorney's fees in the event the losing party appealed to be excessive in the amount of $3,000.[256] In addition, the court held that the $3,500 conditional award granted in the event application was made for writ of error to the supreme court to be excessive in the amount of $2,000, and the conditional award for attorney's fees in the supreme court in the amount of $1,500 in the event the court granted the writ to be excessive by $500.[257]

V. FRAUD AND CONSPIRACY

The majority of the fraud cases decided during the survey period dealt with claims by plaintiffs alleging that a defendant's failure to perform a

248. Smith v. Baldwin, 611 S.W.2d 611, 617 (Tex. 1980); *see supra* notes 230-31 and accompanying text.

249. 28 Tex. Sup. Ct. J. at 191-92. The court went on to hold that a party can recover his attorney's fees in a claim brought under TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1985) even if he does not obtain a net recovery. 28 Tex. Sup. Ct. J. at 192.

250. 659 S.W.2d 929 (Tex. App.—Corpus Christi 1983, no writ).

251. *Id.* at 931.

252. *Id.*

253. 659 S.W.2d 725 (Tex. App.—Houston [14th Dist.] 1983, no writ).

254. *Id.* at 729-30.

255. 670 S.W.2d 657 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

256. *Id.* at 666-67.

257. *Id.* This ruling by the court of appeals is completely unrealistic in light of the fact that the trial below took seven full days to complete. The most efficient of lawyers would certainly be hard pressed to do a competent job of reviewing a record of this size, preparing a quality brief, and attending an oral argument for $4,500. Although the court's ruling must be attributed to the fact that the plaintiff's recovery was only $26,465, the court's ruling would appear to be inappropriate even in light of the amount in controversy. This argument is especially true when one considers the award of attorney's fees that was allowed in the *De Urdanavia* case.

promise constituted actionable fraud. Although the law is well-established that a simple breach of contract is not actionable fraud,[258] failure to perform a promise can form the basis of a fraud action if the plaintiff establishes that at the time the defendant made the promise he had no intention of carrying it out.[259] The plaintiff in *Chancellors Racquet Club v. Schwartz*[260] alleged that he was induced to purchase a membership in the defendant racquet club by the defendant's representation that no discount memberships would be available at any time in the future. Seven months later the defendant offered a lesser-priced membership to the public, which formed the basis of the plaintiff's fraud suit for rescission. The court held that the defendant's representation regarding the nonoccurrence of a future event should be treated just as if the defendant had made a promise to perform in the future.[261] The plaintiff failed to plead and prove that at the time the defendant made the representations he actually planned to offer a discounted membership. The absence of this essential element was fatal to the plaintiff's fraud claim, as well as to his DTPA claim.[262]

In *Dodson v. Sizenbach*[263] the plaintiffs prevailed on their fraud claim based upon the defendant's failure to pay in full a promissory note.[264] The defendant's own testimony established that he never intended to pay the full amount of the note despite his written agreement to the contrary. The court approved of a more indirect means of establishing a present intent not to perform in *Duval County Ranch Co. v. Wooldridge*.[265] The court in *Duval County* held that the breach of a promise to perform coupled with a denial of ever having made the promise is sufficient to show fraudulent intent on the part of the defendant.[266]

The court in *Duval County* also discussed the issues of which parties can be found liable for fraudulent conduct, as well as to what extent damages are recoverable. Specifically, the court held that a principal is liable for the fraudulent misrepresentations of its agent made within the scope of its agency even though the principal has no knowledge of the misrepresentations.[267] The court noted that a director or officer of a corporation who engages in a fraudulent action solely for the benefit of the corporation is personally liable for his fraudulent acts, and that the officer or director and the corporation are jointly and severally liable for the defrauded party's damages.[268] In determining the scope of damages that are appropriate, the court held on an issue of first impression that a plaintiff in an action for

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258. *See* Levine v. Loma Corp., 661 S.W.2d 779, 783 (Tex. App.—Fort Worth 1983, no writ).
259. *Id.*
260. 661 S.W.2d 194 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).
261. *Id.* at 196.
262. *Id.*
263. 663 S.W.2d 13 (Tex. App.—Houston [14th Dist.] 1983, no writ).
264. *Id.* at 15.
265. 674 S.W.2d 332 (Tex. App.—Austin 1984, writ requested).
266. *Id.* at 335.
267. *Id.* at 336-37.
268. *Id.* at 337. See *supra* notes 159-64 and accompanying text for a discussion of these same principles applied in DTPA cases.

fraud is entitled to recover for damage to his business and to his credit.[269]

The only conspiracy cases decided during the survey period merely reiterated well-established principles. In *Roberts v. Harvey*[270] the court held that an essential element of a cause of action for civil conspiracy is an intent on the part of the alleged conspirators to participate in the conspiracy.[271] In *Bates v. Fuller*[272] the court pointed out that if the purpose of the alleged conspiracy is to further a legitimate interest of the conspirators, and if the conspirators are pursuing legitimate means of accomplishing that purpose, the conspiracy is not actionable even if malice toward the plaintiff has motivated the conspirators.[273]

VI. Defamation and Invasion of Privacy

A. *Single Publication Rule*

In *Holloway v. Butler*[274] the court adopted, apparently for the first time in Texas, the single publication rule in cases involving mass media libel.[275] The court distinguished the early case of *Renfro Drug Co. v. Lawson*,[276] which had rejected the rule as applied to retail sales, noting that *Renfro* relied upon a *Restatement* section[277] that has since been supplanted.[278] The *Holloway* court held that:

> [P]ublication is complete on the last day of the mass distribution of copies of the printed matter. It is that day when the publisher, editors and authors have done all they can to relinquish all right of control, title and interest in the printed matter. Publication, however, does not encompass retail sales of individual copies or sales of back issues of the printed matter.[279]

B. *Judicial Privilege*

Three cases dealt with the scope of the absolute privilege that attaches to statements made during the course of, or made in accounts of, judicial pro-

269. 674 S.W.2d at 336.
270. 663 S.W.2d 525 (Tex. App.—El Paso 1983, no writ).
271. *Id.* at 527.
272. 663 S.W.2d 512 (Tex. App.—Tyler 1983, no writ).
273. *Id.* at 517-18. The plaintiffs and the defendants in *Bates* were all heirs of one decedent. The plaintiff alleged that the defendants conspired to convince the decedent to dispose of her property prior to her death in a manner that would be beneficial to the defendants. Since the defendants sought to further their legitimate interests by enhancing the value of the property provided to them under the decedent's estate, the alleged conspiracy was not actionable. *Id.*
274. 662 S.W.2d 688 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). As is generally the case, the court's consideration of the single publication rule arose in the context of determining the point at which the statute of limitations begins to run.
275. *Id.* at 690-92. The court noted that a federal district court had adopted the single publication rule in the context of a publisher's acting through a distributor. *See* Stephenson v. Triangle Pub., Inc., 104 F. Supp. 215, 218 (S.D. Tex. 1952).
276. 138 Tex. 434, 443, 160 S.W.2d 246, 251 (1942).
277. Restatement of Torts § 578 (1938).
278. Restatement (Second) of Torts § 577A (1977) adopts the single publication rule.
279. 662 S.W.2d at 692.

ceedings.[280] In *Levine v. CMP Publications, Inc.*[281] the Fifth Circuit held that the first amendment of the United States Constitution does not extend a privilege to untrue accounts of judicial proceedings.[282] Moreover, the statutory and common law privilege applies only to accounts of what was said on the public record and does not extend to background information or statements of fact.[283] In *Astro Resources Corp. v. Ionics, Inc.*[284] and *Odeneal v. Wofford*[285] the privilege was extended to quasi-judicial proceedings before NASA contracting officers in contract award proceedings and state bar grievance proceedings, respectively. Both courts held that proceedings are quasi-judicial when the decision-maker has the power or duty to investigate and to make conclusions from the investigation.[286]

C. *Damages*

In one of the most significant cases of the survey period, the Supreme Court of Texas held in *Doubleday & Co. v. Rogers*[287] that even in the context of a libel per se, exemplary damages cannot be recovered unless the court awards actual damages.[288] In *Doubleday* the defendant had published a book that contained an admittedly false statement that plaintiff had been indicted three times for practicing optometry without a license. The jury found that the statement was made with malice. The jury further found that Rogers suffered no actual damages, but awarded exemplary damages in the amount of $2,500,000. The trial court entered a take-nothing judgment on the basis of the zero actual damage finding. The court of appeals reversed and awarded the exemplary damages found by the jury.[289] The supreme court reversed and reinstated the take-nothing judgment.[290]

The argument Rogers advanced to support the exemplary award was that in order to recover such damages a plaintiff must only have shown himself entitled to recover actual damages rather than to have actually recovered such damages. The court of appeals[291] and the dissenting[292] and concurring[293] opinions of the supreme court agreed with Rogers's reasoning that

280. TEX. REV. CIV. STAT. ANN. art. 5432 (Vernon 1958) establishes the privilege for "fair, true and impartial" accounts of judicial proceedings.

281. 738 F.2d 660 (5th Cir. 1984).

282. *Id.* at 670; *see* U.S. CONST. amend. I.

283. *Id.* at 668.

284. 577 F. Supp. 446, 447-48 (S.D. Tex. 1983).

285. 668 S.W.2d 819, 820 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

286. *Astro Resources*, 577 F. Supp. at 447; *Odeneal*, 668 S.W.2d at 820; *see also* Putter v. Anderson, 601 S.W.2d 73, 76 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (internal affairs division of police department is quasi-judicial body).

287. 674 S.W.2d 751 (Tex. 1984).

288. *Id.* at 755-56.

289. Rogers v. Doubleday & Co., 644 S.W.2d 833, 835 (Tex. App.—Beaumont 1982).

290. 674 S.W.2d at 755-56.

291. 644 S.W.2d at 835.

292. 674 S.W.2d at 759 (Ray, J., dissenting). The dissent includes an extensive citation to decisions from other jurisdictions that the dissent argues support the exemplary award.

293. 674 S.W.2d at 757 (Kilgarlin, J., concurring and dissenting).

because actual injury is presumed in a libel per se case,[294] punitive damages can be recovered irrespective of whether actual damages are awarded. The policy argument that a defendant who is guilty of libel per se should not escape liability merely because the libeled party enjoys an unassailable reputation supports this conclusion. The supreme court majority, however, noted that as a general rule punitive damages are not recoverable absent an award of actual damages, and they declined to carve out an exception for libel cases.[295] The majority rejected plaintiff's policy argument and offered one of its own, stating that "[i]n light of the overwhelming policy considerations that bear on the law of defamation, it would be peculiarly inappropriate to adopt a rule that singled out libel defendants for a more harsh rule of exemplary damage recovery than avails in other tort cases."[296]

In the context of a slander case the San Antonio court of appeals attacked the knotty problem of what standard of proof the plaintiff must meet in order to secure the presumption of damages in a per se case of slander. *Bolling v. Baker*[297] presented a case between private individuals involving a per se slanderous statement. The jury found malice and awarded actual and exemplary damages. On appeal the defendant argued that the plaintiff had not offered proof of any actual damages caused by the slander and, therefore, the plaintiff was not entitled to rely on the presumption of damage.

The court of appeals first noted that the United States Supreme Court held in *Gertz v. Robert Welch, Inc.*[298] that the presumption of damages is unconstitutional unless actual malice is shown.[299] Subsequently, the Texas Supreme Court adopted a negligence standard with an actual injury requirement in *Foster v. Laredo Newspapers, Inc.*[300] Both *Gertz* and *Foster*, however, involved media defendants. The issue before the court in *Bolling* was whether the presumption of damage was available in a suit between private parties in which actual malice was shown. The court held that nothing in *Gertz* foreclosed the presumption of damage when malice was shown, and so affirmed the trial court judgment.[301]

D. Invasion of Privacy

Braun v. Flynt[302] is a case that deserves reporting for its facts as well as the legal principles it articulates. The plaintiff, a female employee of an amusement park in San Marcos, Texas, performed a novelty act with "Ralph the Diving Pig."[303] Without her knowledge, *Chic* magazine published the

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294. *See* First State Bank v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).
295. 674 S.W.2d at 754.
296. *Id.* at 755.
297. 671 S.W.2d 559 (Tex. App.—San Antonio 1984, writ dism'd).
298. 418 U.S. 323 (1974).
299. *Id.* at 349.
300. 541 S.W.2d 809, 819-20 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1981).
301. 671 S.W.2d at 571.
302. 726 F.2d 245 (5th Cir.), *cert. denied*, 105 S. Ct. 252, 83 L. Ed. 2d 189 (1984).
303. *Id.* at 247. The plaintiff would tread water in a pool while holding a bottle of milk. Ralph would dive into the pool and feed from the bottle.

plaintiff's picture with the pig on a page facing graphic cartoons and photographs. Plaintiff brought an action for libel, slander, and invasion of privacy. The plaintiff recovered separate actual and punitive damage awards for the defamation and invasion of privacy claims.[304]

The Fifth Circuit's opinion in *Braun* presents a good discussion of the expansion of privacy law and the overlap of the libel and false light invasion of privacy causes in action. In particular, the court examined the elements of the false light claim and held that Texas would follow the *Restatement*[305] to require: (a) the false light in which the plaintiff was placed must be highly offensive to a reasonable person, and (b) the defendant must have had knowledge or acted with reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.[306] The court held that the jury verdict found both elements and that the evidence supported the verdict.[307] Of particular significance was the court's reliance upon the decision during the last survey period in *Golden Bear Distribution System v. Chase Revel, Inc.*[308] for the proposition that the jury should properly consider the entire publication.[309] Also of significance was the court's holding that *Gertz* does not preclude an award of punitive damages against a media defendant upon a showing of recklessness or malice.[310]

The overlap between defamation and invasion of privacy causes of action creates the risk of duplicative awards. In *Braun* the court found the jury award duplicative and held that a single publication cannot give rise to a duplicative award merely because the publication yields causes of action for both defamation and invasion of privacy.[311] In *Sherman v. Times Herald Printing Co.*[312] the plaintiff, like Braun, sought recovery based upon claims of defamation and invasion of privacy. The trial court refused to submit the requested issues on the claim for invasion of privacy, but plaintiff recovered on the defamation claim. On appeal the court expressed doubt as to the viability of the claim for invasion of privacy, but did not reach the issue because the court held any recovery on such a claim would be duplicative of the alternate theory of libel.[313]

VII. MISCELLANEOUS

A. Malicious Prosecution

Two cases decided during the survey period addressed the claim of mali-

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304. *Id.* at 256-57.
305. RESTATEMENT (SECOND) OF TORTS § 652(e) (1977).
306. 726 F.2d at 252.
307. *Id.* at 255-58.
308. 708 F.2d 944, 948 (5th Cir. 1983); *see* Hughes, *supra* note 94, at 49.
309. 726 F.2d at 254. The court stated that common sense requires that the context and manner in which a statement or picture appears determines to a large extent its effect upon the person reading or seeing it. *Id.*
310. *Id.* at 256.
311. *Id.* at 258.
312. 671 S.W.2d 700 (Tex. App.—El Paso 1984, no writ).
313. *Id.* at 703.

cious prosecution. In *Fisher v. Beach*[314] the Dallas court of appeals, in a summary judgment context, set out the elements that the plaintiff must prove to establish a claim for malicious prosecution arising out of the institution of a criminal action against the plaintiff. The court stated that to prevail on a claim for malicious prosecution, the plaintiff must prove that the defendant, with malice and without probable cause, caused a prosecution that resulted in acquittal and caused damage to the plaintiff.[315]

In a different context, the Fifth Circuit highlighted one of the shortcomings of the claim of malicious prosecution in its opinion in *Shawnee International, N.V. v. Hondo Drilling Co.*[316] Shawnee alleged that Hondo had joined it as a third-party defendant in an earlier action with knowledge that Shawnee could have no possible third-party liability and that the reason for the joinder was only to extract a settlement from Shawnee. The third-party action had coincidentally come at the time of a proposed sale of Shawnee, and as a result of the claim the purchaser reserved $2,011,499 out of the $2,511,499 purchase price as security for the claim. Shawnee contributed $300,000 to settle the action, and then sued Hondo to recover the settlement amount, attorney's fees, and the value of the loss of the use of the purchase price withheld. The Fifth Circuit affirmed the trial court's dismissal for failure to state a claim.[317] The court relied on *Moore v. Finholt*[318] for the proposition that the mere filing of an action, no matter how unfounded or unjust, is not actionable, unless it involves some wrongful process such as sequestration or attachment.[319] Modern world realities, in which the pendency of a suit can be as much of an interference with the defendant's property or interests as an attachment, suggest a reexamination of this limitation on the tort of malicious prosecution.

B. *Assault—Respondeat Superior*

Two cases during the survey period dealt with the issue of whether an employee was acting within the course and scope of his employment when the employee committed an assault. In *Tierra Drilling Corp. v. Detmar*[320] an oil field supervisor was held not to be within the course and scope of employment when he assaulted another employee.[321] For the employer to be liable, the nature of the employment must necessarily involve the possibility that the use of force may be needed in the employee's performance of his duties.[322] In *Miller v. Towne Services, Inc.*[323] the court held that the employer is liable when the person committing the assault is in the course and scope of

314. 671 S.W.2d 63 (Tex. App.—Dallas 1984, no writ).
315. *Id.* at 66.
316. 742 F.2d 234 (5th Cir. 1984).
317. *Id.* at 236.
318. 638 S.W.2d 169, 171 (Tex. App.—Tyler 1982, no writ).
319. 742 F.2d at 236.
320. 666 S.W.2d 661 (Tex. App.—Corpus Christi 1984, no writ).
321. *Id.* at 662-63.
322. *Id.*
323. 665 S.W.2d 143 (Tex. App.—Houston [1st Dist.] 1983, no writ).

his duties in a management capacity when the assault occurs.[324] In *Miller*, however, the plaintiff did not recover from the employer because he failed to plead the required elements of course and scope of employment and managerial capacity.[325]

324. *Id.* at 146.
325. *Id.* at 147.